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No. 01-1437

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In The

Supreme Court of the United States

BEATRICE BRANCH, *et al.*,

Appellants,

v.

JOHN ROBERT SMITH, *et al.*,

Appellees.

On Appeal From The United States District Court For The Southern District Of Mississippi

REPLY BRIEF FOR APPELLANTS

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Despite the holding in *Growe v. Emison*, 507 U.S. 25, 34 (1993) that state courts are "prefer[red] . . . to federal courts as agents of reapportionment," the Department of Justice delayed preclearance of the state court plan in this case beyond the statutory sixty day deadline. This in turn prompted the District Court to enjoin the plan for a failure to preclear. The District Court also held that the federal constitution deprives the Mississippi courts of any authority over congressional redistricting. This in turn prompted the Department to delay preclearance beyond a second sixty day period for an inability to implement the plan. The Department said no decision will be made until this Court reverses the constitutional ruling.

No party defends the District Court's constitutional analysis. The appellees instead rely upon the untenable theory that state courts have no authority in this situation to enforce federal law under the Supremacy Clause of Article VI unless a federal law claim is written in the complaint. The appellees and the United States argue that the Attorney General could unilaterally postpone the second sixty day period because of the District Court's constitutional ruling. They also claim he could unilaterally postpone the first sixty day period regarding the redistricting plan to request information about the Mississippi Supreme Court's decision in *In Re Mauldin*, No. 2000-M-01891 (Miss. Dec. 13, 2001), even though he does not contend in this Court that *In Re Mauldin* is a voting change for which a preclearance submission is required. These matters are addressed in turn.

I. THE FEDERAL CONSTITUTION DOES NOT PREVENT THE MISSISSIPPI COURTS FROM ADOPTING A CONGRESSIONAL REDISTRICTING PLAN WHEN THE LEGISLATURE DEFAULTS.

As an initial matter, the United States, as *amicus curiae*, suggests the District Court may have erred by deciding the constitutional question prior to any preclearance of the state court plan under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. (Br. 13-14). Although we disagree with the District

Court's ruling, we do not believe the court was required to await preclearance before announcing it.

In *Connor v. Waller*, 421 U.S. 656 (1975), and *United States v. Board of Supervisors of Warren County*, 429 U.S. 642, 646-47 (1977), the federal district courts had allowed elections to go forward under plans not formally submitted for preclearance by concluding that the plans did not violate the constitutional ban on race discrimination. This Court reversed, holding that preclearance was required before the plans could be utilized, and indicating that the courts should not have addressed that constitutional question until the plans were precleared.[1]

The present case is different. The District Court here did not substitute constitutional analysis for the preclearance process in order to utilize an unprecleared plan. Instead, the District Court enjoined the state court plan because of the purported absence of preclearance and issued the constitutional ruling as "an alternative holding" so that "the Supreme Court [will] have before it the case as a whole, instead of truncated sub-parts." J.S. App. 5a. If this Court vacates the constitutional ruling without review on the merits, the District Court will simply reinstate it once the plan is declared precleared, after which a new appeal will be necessary. This likely will take the case into the 2004 election cycle before the constitutional authority of the Mississippi courts is resolved. Neither *Connor* nor *Warren County* involved such a situation. Whatever the benefits of delaying constitutional review in those cases, delay here will frustrate the prompt resolution of an already protracted process.

Turning to the merits, no party before this Court defends the District Court's wholesale disqualification of state courts

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[1] The United States also cites *Wise v. Lipscomb*, 437 U.S. 535 (1978) and *Connor v. Finch*, 431 U.S. 407 (1977) on this point. (Br. 13). But those cases simply repeat the holdings of *Connor v. Waller* and *Warren County* without actually addressing comparable situations.

from participating in the congressional redistricting process pursuant to their general equitable jurisdiction. The appellees (br. 24) and the Jubelirer *amici* (br. 3) concede that the Supremacy Clause of Article VI authorizes courts to adopt congressional redistricting plans in the wake of post-census legislative inaction notwithstanding Article I, § 4. Not only may this be done by federal courts, they admit, but also by state courts so long as a federal claim is written into the complaint. But if the complaint does not mention federal law, they say the federal constitution bars state courts from any role in congressional redistricting.

A state court's authority under the Supremacy Clause to ensure compliance with federal law exists in every case, however, regardless of the nature of the plaintiff's complaint. In *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), the plaintiff brought a state law action in ejectment. Federal law issues were implicated, however, because the property in dispute was affected by federal treaties. In his opinion for the Court, Justice Story said the Supremacy Clause obligated state judges to decide such a case "not . . . merely according to the laws or constitution of the state, but according to the constitution, laws and treaties of the United States." *Id.* at 340-41. He explained that the framers contemplated that "cases within the judicial cognizance of the United States . . . would arise in the state courts in the exercise of their ordinary jurisdiction," and that "state courts will incidentally take cognizance of cases arising under the constitution, the laws, and treaties of the United States." *Id.* at 340, 342. He set forth examples of ways in which state courts would be required to enforce federal law even if it was not raised in the state court complaint. *Id.* at 341-42.

In *Hathorn v. Lovorn*, 457 U.S. 255, 258 (1982), the Mississippi chancery court complaint contained only state law claims and the federal voting rights issue was first raised in a petition for rehearing on appeal. This Court nevertheless held

that the state courts "had the power"and "also . . . the duty" to resolve the case according to federal law. *Id.* at 269-70.

Like the property in *Martin v. Hunter's Lessee*, congressional redistricting after a post-census legislative default implicates federal law. The federal constitution is violated because of the unequal populations of the old districts as reflected by the new census data. In addition, if the state loses or gains a seat, the prior plan will have the wrong number of districts under federal law. State courts, like federal courts, have the authority to rectify these violations. As in *Martin* and *Hathorn*, the state court's authority to act under the Supremacy Clause is not dependent upon the inclusion of a federal claim in the complaint. Given this, and given that the Supremacy Clause allows state courts to enforce federal law regarding congressional districts notwithstanding Art. I, § 4, there is no basis for the constitutional distinction the appellees draw. While the content of the complaint may affect whether the case can be removed to federal court, it does not limit the obligation of state courts under the Supremacy Clause to enforce federal law — in this instance, by adopting a new plan that contained the proper number of districts and satisfied the equal population requirements of Art. I, § 2. *See* J.S. App. 120a-124a (Chancery Court findings regarding the validity of the various redistricting proposals under federal law).

The appellees complain that this Court's review of state court-ordered plans will be limited to compliance with federal law inasmuch as the Court has no supervisory jurisdiction over equitable remedial factors developed by state rather than federal judges. (Br. 23-24). However, that limitation exists whether federal claims are in the state court complaint or not. The scope of review of state court plans is different from federal plans

because of the difference between state and federal courts, not the nature of the state court complaint.[2]

As their next line of defense, the appellees argue there was no federal constitutional violation to cure in the first place because Miss. Code Ann. § 23-15-1039 requires at-large elections in this situation, leaving no basis to act under the Supremacy Clause since at-large elections comply with the equal population principle of Art. I, § 2.[3]

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[2] The appellees say that the Chancery Court's effort to be fair to both incumbents thrown together by the loss of a seat, and to the voters that supported each of them, would be forbidden to a federal court. (Br. 23). That is inaccurate. *See Hastert v. State Board of Elections*, 777 F. Supp. 634, 655 (N.D. Ill. 1991); *Arizonans for Fair Representation v. Symington*, 828 F. Supp. 684, 688-89 (D. Ariz. 1992), *aff'd*, 507 U.S. 981 (1993). Even if prudential considerations adopted by federal courts did preclude this sort of fairness, nothing prevents a state court from designing a plan that ameliorates the loss of a seat by creating a balanced district between the two incumbents who must run against each other. Indeed, this seems a sensible way to solve a difficult problem.

[3] The appellees say the state court plaintiffs "did not challenge the two applicable Mississippi statutes under either federal or state law." (Br. 29-30). That is not accurate. As for the statute containing the pre-existing five-district plan, everyone knew it complied with neither federal nor state law, state officials did not intend to use it, and the appellees concede it was unlawful. (Br. 25). While the state court complaint did not specifically name that statute, the complaint said a new plan was required. J.A. 14-15. No one responded by saying the old statute could be used. As for Miss. Code Ann. § 23-15-1039, it too was not mentioned in the complaint, but once the state court intervenors claimed it mandated at-large elections, the state court plaintiffs argued that it did not apply and that at-large voting would violate federal and state law. J.A. 18-21. Although the appellees call the state court complaint "peculiar" (br. 26), the Mississippi Supreme Court rejected the contention that it insufficiently stated a claim upon which relief could be granted. Petition for Writ of Prohibition, *In Re Mauldin*, No. 2000-M-01891 (Miss.), pp. 6-8 (copies have been lodged with the Clerk); J.S. App. 111a (Mississippi Supreme Court order stating "the request to dismiss the Plaintiff's Amended Complaint is denied.")

Again, this was not the District Court's reasoning. Moreover, as stated in the Section 5 discussion in our opening brief (pp. 37-39), Miss. Code Ann. § 23-15-1033 requires the election of congressional Representatives "by districts." § 1039 envisions at-large voting only if the election is held "before the districts shall have changed to conform to the new apportionment," thus making it clear that districts are to be used absent an emergency. If a state court, exercising its equitable power in the wake of a legislative default, adopts a proper plan, the districts will have been "changed to conform to the new apportionment" and § 1039 is satisfied.

The appellees deride this reading of Mississippi law as "fanciful." As stated in our opening brief (p. 39), their position was rejected by the Mississippi Supreme Court in *In Re Mauldin*, J.S. App. 110a-112a. While the appellees refer to the Federal District Court's agreement with them on this issue (br. 42) , the state supreme court has the last word in interpreting state law.

Further, the appellees do not explain why this reading is fanciful except to say the 1892 legislature that adopted a prior version of § 1039 would not have anticipated court-ordered election plans. (Br. 43). But the language of § 1039 says nothing about who can draw the districts, and does not pretend to forever restrict the task to those who drew them in 1892. If the Mississippi legislature turned over the responsibility of designing districts to a commission, § 1039 would not require at-large elections in lieu of the commission's districts simply because the 1892 legislature did not anticipate commissions.

Finally, even if § 1039 requires at-large elections in this situation, it is superseded by federal law, which requires districts. This is discussed in the briefs in no. 01-1596. Someone had to draw a new plan. The federal constitution does not banish the courts of Mississippi from this process.

II. THE STATE COURT PLAN WAS PRECLEARED.

A. The State Court Plan Was Precleared by Passage of the Second Sixty Day Statutory Period.

On April 23, 2002, after the appeal in this case was filed, the second sixty day period under Section 5 expired. The appellants then filed a motion in the District Court to declare the plan precleared for that reason and promptly informed this Court by way of a supplemental brief pursuant to Rule 18.10. The District Court denied the motion on June 3 and this Court noted probable jurisdiction of the appeal one week later. The appellees now contend this Court has no jurisdiction to resolve the issue about the second sixty day period because no notice of appeal was filed from the June 3 ruling.

But this Court's authority to adjudicate the matter is not dependent on anything the District Court did. The District Court entered no new judgment and made no change to the injunction previously granted on February 26. As appellants, we simply contend that, because of the post-February 26 developments, the state court plan is now unquestionably precleared, the February 26 injunction is no longer supportable on Section 5 grounds, and the Section 5 issue is moot. Alerting the Court to this is no different than informing the Court in the event the Attorney General mailed a letter affirmatively preclearing the plan. This Court certainly may consider intervening events in resolving the existing appeal of the February 26 judgment. *See Tiverton Board of License Commissioners v. Pastore*, 469 U.S. 238, 240 (1985) ("counsel . . . have a 'continuing duty to inform the Court of any development which may conceivably affect the outcome' of the litigation"(internal citation omitted)).

There is no requirement that these developments first be brought to the attention of the lower court. As the United States recognizes (br. 9 n.1), questions of mootness may be raised at any time and a second notice of appeal therefore was

unnecessary. Although not required to do so, the appellants presented this issue to the District Court as a matter of efficiency. The fact that the District Court already has reviewed the question simply means this Court need not remand the case in the event it wishes the District Court to pass on it first. This Court's jurisdiction to review the events since the February 26 judgment is not dependent upon a second notice of appeal.

According to the United States and the appellees, no preclearance occurred on April 23 because the State of Mississippi did not "enact" a redistricting plan and its officials no longer "seek to administer" it (to use the words of Section 5). The United States quotes the definition of "enact" in *Black's Law Dictionary* 546 (7th ed. 1999): "[t]o make into law by authoritative act; to pass." (Br. 10). Certainly, when a court adopts a redistricting plan, this is an authoritative act that "make[s]" the plan "into law" (subject, in this instance, to the preclearance requirement). This would seem to fit the definition.

Even if the plan was not "enact[ed]" for purposes of Section 5, the State of Mississippi clearly "seek[s] to administer" it. Although the state defendants did not file a separate appeal of the District Court's constitutional ruling, the United States is wrong in suggesting that this is akin to the repeal of a statute or the withdrawal of a submission. (Br. 11 n. 2). The Department of Justice did not take that position in its April 1, 2002 letter. Indeed, the Department could not have done so since the state defendants had until April 27 to appeal the February 26 judgment. 28 U.S.C. § 2101(b). In the April 1 letter, the Department took note of the appeal filed by the Branch federal intervenors, and said: "If the injunction against implementation of these changes is lifted, upon notification, the Attorney General will again consider these changes for preclearance unless the state notifies us of its intent to alter them." J.A. 29. The Department did not consider this submission to have been withdrawn and did not say that the state defendants must file a

separate appeal in order for the State to continue to "seek to administer" the plan.

In addition, the second sixty day period ended on April 23, four days before the appeal time expired. By definition, the absence of a timely appeal by the state defendants could not suspend that particular sixty day period. The plan was precleared before it could be said that the state defendants had declined to file a timely appeal.

Moreover, the state defendants knew that the Branch federal intervenors had appealed the District Court's ruling and that the propriety of the constitutional injunction would be reviewed by this Court. There was no need for them to institute a separate appeal. Whether the Department is justified in declining to make a preclearance decision when no one appeals and the constitutional injunction will forever remain intact, that is not the situation here. The state defendants chose not to participate in either the state or federal court trials. It is no surprise, then, that they did not file an appeal. Congressional redistricting battles carry intensely partisan overtones, and state officials may occasionally prefer to stay away from the fray. Appellate review will sometimes be secured by parties other than the public officials who are named in the case. *See, Abrams v. Johnson*, 521 U.S. 74, 78 (1997) (private intervenors appealed validity of federal court-ordered congressional plan even though state defendants not only declined to appeal the plan, but actually defended it).

That does not alter the status of a redistricting plan under Section 5. This is particularly true where, as here, the state defendants are in the case in their ministerial capacities as members of the State Board of Election Commissioners. The state court plan was adopted by the Chancery Court consistent with the order of the Mississippi Supreme Court in *In Re Mauldin*. The Mississippi Attorney General submitted it for preclearance in his ministerial capacity and in obedience to the

Chancery Court order. *See Hathorn*, 457 U.S. at 270 n.24 (recognizing authority of a state court to order the parties to submit a plan for preclearance). This is not a plan for which the state defendants are responsible and they have no power to change, override, or withdraw it.

Next, the United States turns to the language of Section 5 providing that a voting change "may be enforced" if precleared, and suggests that preclearance is precluded where other obstacles to enforcement exist. (Br. 14-15). However, those words from the statute indicate only that once preclearance is achieved, Section 5 is no longer a barrier to enforcement. They have never been interpreted to mean that all non-Section 5 obstacles must first be eliminated. *See Morris v. Gressette*, 432 U.S. 491, 505 (1977) ("the Attorney General's failure to object is not conclusive with respect to the constitutionality of the submitted state legislation.") The purpose of the sixty day rule is to remove Section 5 as a barrier to non-retrogressive changes within a short period of time. There may be other obstacles — including pre-preclearance and post-preclearance constitutional injunctions — but those do not detract from the importance of removing the Section 5 barrier within "the period specified in the statute." *Id.* at 504.

Contrary to the fears of the United States (br. 15), enforcement of the sixty day deadline absent an exception for constitutional injunctions will not hamper the administration of Section 5. As it is now, the Attorney General sometimes reviews and preclears plans that later are enjoined on other grounds. It will be no more wasteful, and the "benchmark" analysis will be no more complicated, if the Attorney General occasionally preclears a plan that previously was enjoined, and the injunction is later upheld on appeal. The United States acknowledges that situations like this are very rare. (Br. 14). The burden is therefore small. On the other hand, jurisdictions like Mississippi, already enduring the delay involved while the constitutional

injunction is reversed, should not be saddled with further delay by a Justice Department suspension of the statutory period.

Although the appellees refer to the Department's "application of § 5 and its implementing regulations"(br. 48, 49-50), there is no regulation allowing the Attorney General to suspend the sixty day period on the basis of a constitutional injunction. The United States refers obliquely to 28 C.F.R. 51.22(a), which precludes "premature submission[s]" (br. 14), and the appellees say that the April 1 letter concluded the submission was premature. (Br. 47). But the plan was not "premature" when submitted on December 26, 2001. The Mississippi Supreme Court had already held that "[a]ny congressional redistricting plan adopted by the chancery court . . . will remain in effect, subject to any . . . plan which may be timely adopted by the Legislature." *In Re Mauldin*, J.S. App. 111a. To the extent the United States' reference to § 51.22(a) implies some notion of retroactive prematurity, there is no basis for that unusual concept in the regulations, much less the language of the statute.

Section 5 provides that when a state "enact[s] or seek[s] to administer" a voting change, the change is precleared if it "has been submitted . . . to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission." While the District Court's constitutional ruling may have prevented Mississippi from "administer[ing]" the state court plan, it did not change the fact that the State "enact[ed] or *seek[s]* to administer" the plan and that its officials will be ready to administer the plan once the injunction is lifted. Because there is no exception to the sixty day rule for constitutional injunctions, the plan has been precleared.

B. The State Court Plan Was Precleared by Passage of the First Sixty Day Statutory Period.

1. The Decision of the Supreme Court of Mississippi in *In Re Mauldin* Is Not a Voting Change.

When a covered jurisdiction institutes a voting change, it must obtain federal preclearance by demonstrating that the change does not have a racially retrogressive intent or effect. This can be done either by pursuing a declaratory judgment action in federal district court in the District of Columbia or submitting the change to the Attorney General for administrative preclearance. A decision by the Attorney General to grant or deny preclearance is not reviewable in a local federal district court. *Morris v. Gressette*, 432 U.S. at 502-505 & n. 21. However, when private litigants like the Smith federal plaintiffs (appellees here) seek to enjoin the implementation of an allegedly unprecleared change, local federal courts are required to determine "(i) whether a change was covered by § 5, (ii) if the change was covered, whether § 5's approval requirements were satisfied, and (iii) if the requirements were not satisfied, what remedy was appropriate." *City of Lockhart v. United States*, 460 U.S. 125, 129 n.3 (1983).

The United States argues that the more-information request is a conditional determination that the jurisdiction has thus far failed to submit enough to carry its substantive burden under Section 5. Because this is akin to an explicit denial of administrative preclearance, says the United States, it is not subject to judicial review in local federal courts (Br. 18-20).

But here, the Attorney General never said the information was insufficient or the State had failed to carry its burden regarding the state court plan itself. In fact, the February 14 letter said "the Department is not formally seeking additional information regarding the redistricting plan." J.S. App. 195a. Instead, the letter referred specifically to the Mississippi Supreme

Court decision in *In Re Mauldin* and said "the information sent to date regarding *this change* is insufficient to enable us to determine that [it satisfies Section 5's substantive requirements]." J.S. App. 193a (emphasis added). If, however, *In Re Mauldin* itself is not a voting change covered by § 5, no information need be submitted about it in the first place and the Attorney General's determination that the information is insufficient makes no difference with respect to the preclearance of the plan.

As mentioned previously, the question of "whether a change was covered by § 5" is within the province of local federal courts and this Court on appeal. *City of Lockhart*, 460 U.S. at 129 n.3. At least on that point, this Court is not being asked (for purposes of this issue) to review the propriety of any substantive determination by the Attorney General about the insufficiency of the information regarding *In Re Mauldin*, but instead whether *In Re Mauldin* is subject to Section 5 at all. If not, the state court plan itself, about which no determination of insufficient information was made, has been precleared by passage of the sixty day calendar. Clearly, the local federal court, and this Court on appeal, can review this question and decide "whether § 5's approval requirements were satisfied," *City of Lockhart*, 460 U.S. at 129 n.3, by passage of the statutory sixty day period.[4]

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[4] The United States suggests there is no need for a judicial determination here because the State can file a declaratory judgment action in the District of Columbia if the Department takes too long to make a decision. (Br. 19). But that is an expensive and time-consuming prospect. Further, it is unnecessary if the plan has already been precleared through the passage of the sixty day period. The "statutorily prescribed 'rapid method'" of administrative preclearance, *Morris*, 432 U.S. at 504 n. 19 (citation omitted), is not vindicated by permitting the Department to postpone the statutory period at will and providing that the only recourse is an expenditure of the time and resources necessary to litigate in the District of Columbia.

The appellees ask this Court to defer to the position of the United States Attorney General that *In Re Mauldin* reflects a voting change. (Br. 39). But the Attorney General *does not take that position in this Court*. While the brief for the United States says that "the Attorney General may not preclear a districting plan if that plan was developed through a process that itself violated Section 5" (br. 24), the United States does not contend that the process here violated Section 5 or that the assumption of jurisdiction is a voting change.

Instead, the United States argues that the Department had a right to postpone the statutory sixty day period even if this Court "ultimately determines that the vesting of jurisdiction in the chancery court was not subject to preclearance." (Br. 26). According to the United States, the Department may unilaterally extend the sixty day period irrespective of "whether the State's initial submission was in fact complete," so long as "the Attorney General had any possible foundation for seeking more information." (Br. 25).

The foundation here, says the United States, stems from the fact that "[t]he submission in this case presented the Attorney General with the novel question of whether the assumption of jurisdiction to issue a remedial redistricting order was the sort of change 'with respect to voting' covered by Section 5." (Br. 26). Rather than answer that question and make a decision within sixty days of the submission, the Department requested more information — according to the United States' brief — in order to consider "whether the assumption of jurisdiction . . . [was] the invocation of a power that predated the Voting Rights Act" (br. 27) and also to consider "the discriminatory potential of such a change." (Br. 28). In short, says the United States, preclearance of the plan was delayed to decide if the assumption of jurisdiction "satisfied Section 5's standards without deciding whether it was subject to those standards." (Br. 28).

However, Section 5 does not authorize the Attorney General to extend the statutory period to give the Department extra time to make up its mind about "novel questions" or find a way to dodge them. If the assumption of jurisdiction is not a change "with respect to voting" subject to Section 5's standards, preclearance of it is not required and no information need be submitted about it. The sixty day statutory deadline is not so malleable that it can be expanded in order to request information that a state is not required to submit in the first place. *See, Morris v. Gressette*, 432 U.S. at 504 (the Section 5 process "was to come to an end when the Attorney General failed to interpose a timely objection based on a complete submission").[5]

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[5] Noting the District Court's view that this was a change, the United States contends that although the Attorney General is not bound by the District Court's view, any disagreement would have had "serious practical consequences" because the District Court might have enjoined the plan if the Attorney General precleared it without making a decision on the assumption of jurisdiction. (Br. 27). But the Department's failure to make a decision within sixty days guaranteed that the District Court would enjoin the plan, with the "serious practical consequence" of precluding the Mississippi state courts, who are "prefer[red] . . . to federal courts as agents of apportionment," *Growe v. Emison*, 507 U.S. 25, 34 (1993), from implementing their plan. If the Department had precleared the plan within sixty days and stated that the assumption of jurisdiction was not a change for which preclearance was required, the plan would have been enforceable and the District Court could not have enjoined the plan on Section 5 grounds. Even if the District Court had done so, there would have been a very simple issue for this Court to review on an emergency motion for stay. (As it was, this Court was faced in the motion for stay with a much more complicated situation where the plan itself was not precleared). In addition, the Department could have stated that the assumption of jurisdiction was not a voting change, but that even if it was, it was not racially discriminatory and therefore satisfied Section 5's substantive standards. Finally, the Department could have precleared the plan, stated that the assumption of jurisdiction was not a voting change, and nevertheless requested more information so that it could later make a preclearance decision on the assumption of jurisdiction out of an abundance of caution. Any of these

The question, then, is whether the assumption of jurisdiction was a voting change. The United States does not argue that it was, and its brief states that no one else has ever taken that position in the past: "This was the first time that any jurisdiction submitted a court's assumption of jurisdiction for preclearance and the first time any court has suggested that such a change might be covered by Section 5." (Br. 26 n.12). Moreover, no one has taken that position since this episode, as underscored by the Department's July, 2002 preclearance of the North Carolina state court plan for legislative elections.[6]

The United States says North Carolina is different because no one from North Carolina suggested that the decision in *Stephenson v. Bartlett*, 562 S.E.2d 377 (N.C. 2002), marked a change in the authority of state courts. Although the United States admits that the Attorney General attempts to identify changes requiring preclearance even when they are not submitted, it says the large volume of submissions necessarily focuses the Department's attention on those changes identified by the parties. (Br. 30 n.14). But the Department reviews only a small number of statewide plans each redistricting cycle, and an even smaller number of state court-ordered plans. In the wake of the very recent Mississippi experience, this issue plainly was on the Department's radar screen. It would seem the Department at least would have inquired as to whether the assumption of jurisdiction in North Carolina was a break with the past. A brief search would have uncovered *Leonard v. Maxwell*, 3 S.E.2d 316, 324 (N.C. 1939), which predates *Baker v. Carr*, 369 U.S. 186 (1962), and demonstrates that North Carolina is no different than Mississippi in this respect.

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alternatives was preferable to the Department's decision to delay implementation of the plan while it figured out what to do.

[6] The North Carolina preclearance letter was lodged by the NAACP *amici* with the Clerk. The submission letter is attached to their brief.

Moreover, the situation has now clearly been called to the Department's attention by the briefs in this case. Yet we are aware of no request by the Department that North Carolina submit the assumption of jurisdiction by the supreme court of that state for approval under Section 5.

Unlike the change in procedures for selecting election judges in *Foreman v. Dallas County*, 521 U.S. 979 (1997), which meant that one set of election of officials would be replaced by another, the assumption of jurisdiction by state courts does not involve a reassignment or transfer of redistricting authority from the legislature. The courts are simply exercising equitable authority they have always possessed even though they did not utilize it in redistricting matters before *Baker v. Carr*.

As illustrated by the examples in our opening brief (pp. 35-37), the flexibility and breadth inherent in the equitable powers of courts, and the evolution of precedent governing when and how courts assume jurisdiction, do not easily lend themselves to the before-and-after analysis involved in determining whether something is a voting change. Clearly, if a state court adopts a new redistricting plan, a change has occurred. But the decision of a court of equity to assume jurisdiction in a new or somewhat different type of case does not independently mark the sort of transformation in voting practices that Section 5 was designed to encompass.

The United States does not contend otherwise in this Court. Because there was no need to submit information about the assumption of jurisdiction in *In Re Mauldin*, the Department's request for more information about it did not restart the sixty day deadline on the redistricting plan.

2. The Use of Districts Is Not a Voting Change.

As noted in our opening brief (pp. 37-39) and earlier in this reply brief, the state court's adoption of a plan containing districts does not deviate from Miss. Code Ann. § 23-15-1039. Therefore, it is not a voting change for which the Department can

seek more information in order to postpone the sixty day deadline regarding the plan itself. Like the assumption of jurisdiction, the United States does not argue in this Court that this is a change, but instead contends the Department can postpone the sixty day deadline to request more information about it even if it is not a change. We have already addressed that argument.[7]

3. Even If These Are Voting Changes, the Attorney General Could Not Extend the Sixty Day Deadline When the Information Initially Provided Demonstrates These Matters Had Already "Been Submitted" for Section 5 Review.

According to the United States, the request for more information regarding *In Re Mauldin* and § 1039 was tantamount to a conclusion that the State provided insufficient information to meet its burden under Section 5, and local federal courts — and this Court on appeal — have no authority to second-guess that conclusion. (Br. 19-20). Earlier in this brief, we demonstrated that this makes no difference if these matters are not voting changes.

Even if they are voting changes, judicial examination is proper to determine whether the request for more information properly restarted the sixty day calendar. The February 14 letter was based not on a substantive conclusion that the State had failed to prove the absence of discrimination, but on a contention that the information was insufficient to make a decision either

[7] The United States is inaccurate when saying the Mississippi Attorney General indicated that the purported departure from § 1039 was a voting change. (Br. 27 n. 13). The Mississippi Attorney General merely said he was submitting that matter, as well as the assumption of jurisdiction, for review "to the extent" they constitute voting changes. J.S. App. 228a. He indicated that the submission of these items should not be viewed as a concession that they are covered by Section 5. J.S. App. 225a.

way. As stated in our opening brief (p. 43), the Attorney General may not restart the sixty day period unless the information initially submitted is so inadequate that the plan cannot be said to have "been submitted" (as that phrase is used in Section 5) in the first place. *See also Morris*, 432 U.S. at 504 n. 19 (the Attorney General has no authority to extend the deadline beyond the time "a complete submission has been pending . . . for 60 days"). Because the local federal court has the duty to determine "whether § 5's approval requirements have been satisfied," *City of Lockhart*, 460 U.S. at 129 n.3, it also has the duty to decide if the change (in the words of Section 5) "has been submitted . . . to the Attorney General and the Attorney General has not objected within sixty days after such submission."

Even employing the deferential review that the United States urges (br. 23), it is clear that *In Re Mauldin* had "been submitted" with the initial submission on December 26, 2001. All of the specific information that the Department requires in 28 C.F.R. 51.27 was provided at that time. Moreover, this was not a displacement of the legislature as the primary decisionmaker for congressional redistricting in Mississippi. There was no need for information to compare, for example, the racial composition of the state's judiciary with its legislature.

It has been clear since *Scott v. Germano*, 381 U.S. 407 (1965), that state court judges could adopt statewide redistricting plans. *Growe* reaffirmed this in 1993. It has been clear since *Hathorn v. Lovorn* in 1982 that voting changes ordered by state court judges in Section 5 jurisdictions are subject to preclearance. The notion of state trial judges adopting statewide plans is not something out of the blue that required more than sixty days to analyze under Section 5.

In all states, the decisions of trial judges exercising general equitable jurisdiction are subject to review by the state supreme court. *See, e.g., Perry v. Del Rio*, 67 S.W.2d 85 (Tex. 2001) (granting emergency review and overturning trial court order

adopting congressional plan). In the many states where trial judges are elected, they are chosen from local election districts whose demographics do not necessarily mirror those of the entire state. If this is somehow retrogressive in one state, it is retrogressive in all. Nothing about the demographics or venue provisions in Mississippi make it any different for retrogression purposes from Louisiana or Alabama. The Department did not need to ask the questions it asked to make a decision, and the request was unnecessary and frivolous. This purported change had "been submitted" on December 26, 2001.[8]

Although the United States complains of administrative problems if the deadline cannot be postponed at will by requesting more information, any problems can be minimized by reviewing the submission and requesting the information on the tenth or twentieth day rather than waiting until the fiftieth day as here.

Finally, the appellees, but not the United States, contend that the sixty day period on the plan itself could not begin until *In Re Mauldin* was precleared. (Br. 46-47). That erroneously suggests that multiple matters cannot be submitted simultaneously. Even if the appellees are correct, the sixty day period on the plan began running on February 26 when *In Re Mauldin* was precleared, and the plan is now also precleared.

CONCLUSION

The District Court decision should be reversed.

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[8] Similarly, any change from any at-large elections prescribed by § 1039 to a plan using districts could be easily evaluated for retrogression based on the information initially submitted, particularly given that Mississippi is, like so many other states, majority white.

Respectfully Submitted,

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